Filed 8/24/04 P. v. Olvera CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAUL RAYMOND OLVERA, Defendant and Appellant.	H026134 (Monterey County Super. Ct. No. SC 010272)

Appellant challenges an order recommitting him to Atascadero State Hospital as a sexually violent predator. He contends that the trial court erred in denying his motion for self-representation, that the trial court erred in failing to instruct the jury on volitional impairment, and that the jury's verdict was insufficient to support the court's judgment and order of commitment. We affirm.

SVPA PROCEEDINGS

Appellant was the subject of a petition for extension of commitment as a sexually violent predator (SVP) filed in August 2001. (Welf. & Inst. Code, § 6600 et seq.) In December 2001 the trial court found that the petition was supported by probable cause. In April 2003 a jury trial was held on the allegations in the petition. The parties stipulated that appellant had been convicted in separate cases of sexually violent offenses against two or more victims and that for each offense he had received a determinate

sentence in state prison. The parties stipulated that the offenses for which appellant was previously convicted were predatory within the meaning of the Sexually Violent Predator Act (SVPA) in that the offenses were committed against children with whom appellant had no substantial relationship and with whom a relationship was established for the primary purpose of victimization.

Two psychologists testified at trial that appellant had a diagnosed mental disorder that made him a danger to the health and safety of others in that it was likely he would engage in sexually violent behavior upon release. The first psychologist stated that appellant's volitional impairment was evidenced by the fact that he offended soon after his release from custody. She testified that, although appellant had four parole violations, he continued to go to areas with children and had no insight into the notion that going to areas frequented by children would pose a high risk of re-offending. She said appellant was in the high range for future sexual re-offense and that he had dropped out of treatment despite the fact that he continued to have deviant urges.

The second psychologist testified that appellant suffered from pedophilia and that appellant's condition was chronic. Based on appellant's past pattern of behavior, the psychologist believed appellant would be molesting children "within days" of release. She said that appellant did not think that he had a problem and that, in her opinion, he was "extremely dangerous."

A third psychologist testified that appellant showed excessive anger, had difficulty following hospital rules and policies, and denied having high risk factors for re-offending. A psychiatric technician at Atascadero, who had appellant in her unit for two years, testified that appellant was argumentative, was hostile, was unable to control his temper, and had poor impulse control.

A fourth psychologist testified that appellant did not meet the requirements of the SVPA because, although there was considerable evidence that appellant suffered from sexual psychopathology in the form of pedophilia, appellant no longer had serious

difficulty controlling his behavior. A witness with a doctorate degree in psychology testified that appellant did not meet the criteria of the SVPA because, in the witness's opinion, appellant was not unable to control his behavior.

Various other witnesses testified, including appellant's niece and the principal of the niece's middle school who testified concerning appellant coming to the middle school campus without authorization and taking photographs.

On April 16, 2003, the jury returned a special verdict finding appellant to be a sexually violent predator within the meaning of Welfare and Institutions Code section 6600. The court ordered appellant recommitted to Atascadero State Hospital for two years.

MOTION FOR SELF-REPRESENTATION

Background

Appellant contends the trial court erroneously denied his request to represent himself. On August 27, 2001, appellant appeared and requested the appointment of counsel. A public defender who was present in court accepted the appointment by the court. The court continued the matter for setting of the probable cause hearing and "determination if defendant will represent himself."

On September 11, 2001, appellant filed a pro per motion "to allow for non-penal housing of respondent during W.I.C. § 6600 et. seq. Proceedings." He asked to be housed in the mental health unit of Natividad Medical Center rather than in the county jail during the pendency of the SVP proceedings. The prosecution's opposition to this motion included a declaration from a staff psychiatrist at Natividad detailing problems associated with housing appellant there in 1999 and stating that appellant "seemed to derive enjoyment and personal satisfaction from 'stirring the pot' among our very psychotic patients."

When appellant appeared in court on September 12 the court took up his motion for non-penal housing. Appellant complained that, because he was housed in the jail, his

medical needs were "not being addressed properly" and described his medical, dental and medication problems. He told the court that his medical needs were addressed properly at Atascadero but that there he was not able to "adequately prepare" by making telephone calls to his "potential witnesses." When the court told appellant that that is what his attorney was for, appellant complained that he had not been able to speak with his attorney because his attorney's office would not accept collect calls from Atascadero. Counsel explained that there had been a problem with his office accepting the calls, and said he would "check on that."

The trial court denied appellant's motion for non-penal housing. The court said, "As to . . . respondent's request to represent himself, we're going to have a hearing on that request. I will need you to file, anything you would like to file, in writing. I would like you also to address your waivers under . . . [*Faretta v. California* (1975) 422 U.S. 806], and I need to see why you feel that would be appropriate, need to see whether or not you qualify to do so, whether or not it would be appropriate for the Court to agree." When asked by the court "how much time do you think you're going to need to prepare that paperwork to try to persuade the Court that you should be representing yourself and not have counsel," counsel answered that appellant had indicated that he would need "as much as a month."

The court referred to the *Faretta* waiver form and told appellant, "I'm expecting you to fill out more than just that form. I expect you to, as you did in this motion, to file whatever you would like to file to try and convince the Court that your self-representation is in your best interest." Appellant said he would "do [his] best." The court supplied appellant with a *Faretta* waiver form.

On October 18, 2001, appellant filed a "motion for substitution of counsel by respondent in custody," which included a declaration from appellant and a memorandum of points and authorities. The motion stated that appellant was receiving inadequate representation and that "substitution [was] necessary to ensure the rights to effective

assistance of counsel and to gain meaningful advocacy." Appellant asked the court to appoint "a civil/mental health attorney" to represent him. The motion made no mention of appellant's request for self-representation.

On October 25, 2001, the court held a hearing on appellant's motion for substitution of appointed counsel. During the hearing, appellant complained that counsel had not arranged for him to be evaluated by other psychologists at the hospital noting, "of course, I can't make those arrangements." He said he wanted to be subjected to a polygraph examination to "establish things that keep getting bypassed." Counsel noted that "fairly early in the proceedings" appellant "asked for substitution of counsel or to represent himself." He explained that he and appellant disagreed as to the course of his defense and cited as an example appellant's wish to call as a witness the victim of one of his underlying offenses "who was at the time a child, and so now this has been something close to 15 to 18 years later to offer evidence to the jury that the circumstances of the underlying offense are not as they are believed to be now." Counsel explained that he had arranged for two experts to evaluate appellant.

The court denied appellant's motion for substitution of appointed counsel and took up appellant's request for self-representation. The court asked appellant if he had "filled out a completed waiver form such as this?" Appellant answered, "No. I didn't have the opportunity to do that because I was returned immediately to Atascadero to do that."

The court said, "At this point in time based upon statements that you have made that the Court needs to place on the record, specifically that you are a lay person and are untrained in the practice of law, as well as some other aspects of this particular case concerning representation, preparation of a defense, hiring of experts, talking to potential witnesses, the Court does not feel that it would be appropriate to have you represent yourself, and [defense counsel] will remain as counsel." The court then set the matter for a probable cause hearing.

By April 2002 new appointed counsel appeared with appellant and continued to represent him throughout his jury trial in April 2003.

Analysis

Appellant contends the trial court improperly denied appellant his right to self-representation. He argues that the federal constitutional right to self-representation applies to SVP proceedings and that the denial of his timely motion for self-representation on the grounds of professional incompetence was error. He contends that the improper denial of his request for self-representation was constitutional error of structural magnitude, prejudicial per se, requiring mandatory reversal.

Respondent argues that there is no constitutional right to self-representation in SVP proceedings, which are civil in nature and do not provide for the same constitutional protections as criminal trials. In support, respondent cites *People v. Williams* (2003) 110 Cal.App.4th 1577, which held that there is no constitutional right to self-representation in mentally disordered offender proceedings.

In *People v. Williams*, the trial court extended Williams's commitment as a mentally disordered offender (MDO) pursuant to Penal Code section 2970. Williams argued that his commitment should be reversed because the trial court had denied his motion for self-representation at the trial on his MDO petition. The court reviewed the language of the MDO statutes and determined that, because MDO proceedings were civil, rather than criminal, Williams had no constitutional right to self-representation. The court said, "However, as the MDO commitment statutes give defendants the right to appointed counsel, a defendant also could refuse counsel and represent him or herself. The right only being statutory, any denial of a request to represent oneself is governed by due process principles and the decision is reviewed for an abuse of discretion." (*Williams, supra*, 110 Cal.App.4th at p. 1588.) Other cases establish a statutory right to self-representation for parents in dependency proceedings, and review of a denial of that

right is under a harmless error standard. (*In re Justin L.*(1987) 188 Cal.App.3d 1068; *In re Angel W*. (2001) 93 Cal.App.4th 1074.)

Appellant argues, "the statutory scheme in the present case goes farther than those involved in MD[O] or dependency proceedings. They make explicitly clear that the legislature sought to endow respondents in SVP proceedings with the benefit of 'constitutional protections' not simply statutory rights."

For SVP initial commitment proceedings, Welfare and Institutions Code section 6603, subdivision (a), provides: "A person subject to this article shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf."

Welfare and Institutions Code section 6605 provides that, once a person is committed as an SVP, annual mental exams are required to ensure that any commitment ordered under the SVPA does not continue in the event the SVP's condition materially improves, and, unless waived by the SVP, the court must set an annual show cause hearing to determine "whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she would not be a danger to the health and safety of others if discharged." (Subd. (b).) Subdivision (d) provides: "At the hearing, the committed person shall have the right to be present and *shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding*. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on

his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged." (Italics added.)

Appellant argues that, by the use of the phrase "constitutional protections" in section 6605, subdivision (d), the statute "did not create a newly tailored right to jury trial or to counsel, but rather incorporated those rights as constitutionally conceived and grounded." Appellant contends that the SVP statute afforded appellant a *constitutional* right to counsel that includes the right of self-representation.

We do not consider the language of the SVPA, including use of the phrase "constitutional protections" in section 6605, subdivision (d), to establish a constitutional right of self-representation for the respondent in SVP proceedings. The statute speaks of the respondent being "entitled to the benefit of all the constitutional protections" afforded at initial commitment proceedings. The "protections" to which a respondent is entitled are those that protect the integrity of the fact-finding process in this civil commitment scheme. The respondent's entitlement to these protections does not put an SVPA respondent on equal footing with a criminal defendant. The numerous procedural and evidentiary protections afforded by the SVPA demonstrate that the statute was crafted to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171, fn. 33.) By requiring a unanimous jury verdict, and by using the reasonable doubt standard, the SVPA uses constitutional procedures to further the accuracy of the verdict and to narrow its application.[1] Those constitutional protections that enhance the

[1] See Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator* (2000) 37 San Diego L. Rev. 1057.

truth-finding process are included. The right to self-representation recognized in *Faretta* "is not one which followed from constitutional concepts directed to according to an accused *protections* designed to aid in the search for truth or to insure the integrity of the fact-finding process" and strict compliance with *Faretta* "will most likely have the directly opposite effect." (*People v. McDanie*l (1976) 16 Cal.3d 156, 164, 166, italics added.)

As noted in *Hubbart*, the SVPA "was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups" and the persons eligible for commitment and treatment as SVP's are to be viewed " 'not as criminals, but as sick persons.' (§ 6250.)" (*Hubbart, supra*, 19 Cal.4th 1138, at p. 1171.) The "constitutional protections" referred to in subdivison (d) are those that protect the integrity and accuracy of the fact-finding process.

Appellant argues, "Due process and fundamental fairness, in and of themselves, afforded appellant a *Faretta* right to represent himself and, as such, the statutory scheme governing the commitment procedure comports with the conclusion to be derived from the requisite due process analysis." He argues that "due regard for appellant's liberty interests and a 'respect for individual autonomy' [citations] outweigh any countervailing governmental interest against allowing appellant to represent himself." We disagree. Appellant's liberty interests are protected by the numerous procedural protections in place to insure an accurate decision by the fact-finder, and such accuracy is important to advance the state's interest in insuring that the SVP, perhaps the most dangerous of the dangerous in our society, receives the necessary treatment and confinement. To whatever extent self-representation furthers respect for individual autonomy, it undermines the truth-seeking protections built into SVP proceedings, increasing the risk of a wrongful commitment. Due process does not require a right to self-representation in SVP proceedings.

The court in *Williams* found a statutory right to self-representation in MDO proceedings, and respondent seems to concede that appellant has a statutory right to represent himself. (*Williams, supra*, 110 Cal.App.4th at p. 1588.) Assuming this concession is appropriate, the trial court did not abuse its discretion in denying appellant's request.

Before a criminal defendant can be permitted to represent himself, the trial court must determine that his choice is knowing, intelligent, and unequivocal. While there is no formula for determining whether a choice is knowing and intelligent, the court must assure that defendant is aware of the dangers and disadvantages of self-representation. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1012.) Although a *Faretta* waiver form should not be used to test a criminal defendant's competency to act as his own lawyer, such a form is "a means by which the judge and the defendant seeking self-representation may have a meaningful dialogue concerning the dangers and responsibilities of self-representation" and "[t]he advisements in the form also serve to warn the defendant of the complexities of the task about to be undertaken." (*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1322.)

Here, the trial court presented appellant with a "*Faretta* form" to review before his next court appearance. Appellant promised he would "do [his] best" to complete the form. However, when the court asked him if he had completed the form, appellant answered, "No. I didn't have the opportunity to do that because I was returned immediately to Atascadero to do that." This remark is puzzling for two reasons. First, at the conclusion of this hearing defense counsel said that appellant was "asking that he be transported back as soon as possible. Unfortunately, he was basically accidentally kept here longer last time than necessary." The prosecutor said, "As I understand, he was kept here a full two weeks after he was last in court." Second, appellant managed to prepare and file his motion for substitution of appointed counsel, which made no mention of self-representation, while at Atascadero.

As observed in *People v. Marshall* (1997) 15 Cal.4th 1, 22: "Some courts have held that vacillation between requests for counsel and for self-representation amounts to equivocation or to waiver or forfeiture of the right of self-representation. (*Williams v. Bartlett* (2d Cir. 1994) 44 F.3d 95, 100-101; *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607, 611; *United States v. Bennett* (10th Cir. 1976) 539 F.2d 45, 49-51; *Olson v. State* (Ind. 1990) 563 N.E.2d 565, 570; *State v. Lewis* (N.M.Ct.App. 1986) 726 P.2d 354, 359.) And another court has advised that the defendant's conduct, as well as words, must be taken into account, stating: 'Equivocation, which sometimes refers only to speech, is broader in the context of the Sixth Amendment, and takes into account conduct as well as other expressions of intent.' (*Williams v. Bartlett*, *supra*, 44 F.3d at p. 100.)"

When assessing whether a request for self-representation is unequivocal, the trial court "should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words" to determine if any ambiguity has been expressed and whether the defendant truly desires to represent himself or herself. (*People v. Marshall, supra,* 15 Cal.4th at p. 23.) Courts should draw every reasonable inference *against* waiver of the right to counsel. (*Ibid*., *People v. Koontz* (2002) 27 Cal.4th 1041.) The record here reveals not only equivocation, but also evidence that appellant did not have a sincere interest in waiving his right to counsel. During the hearing on his motion for substitution of appointed counsel, appellant said nothing to indicate a continued desire for self-representation and complained that he wanted counsel to arrange for him to be evaluated by other psychologists at the hospital noting that he was unable to make those arrangements himself. Appellant could be seen as attempting to stir the pot, that is, to subvert the orderly administration of justice by "juggling his *Faretta* rights with his right to counsel interspersed with *Marsden* motions." (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.)

Appellant declined to participate in the court's efforts to advise him of the dangers of self-representation through the waiver form during the same time period he filed a

lengthy request for substitution of appointed counsel, which was contradictory to his earlier request. In so doing, appellant created an ambiguity as his desire to actually invoke his right to self-representation. The court did not err in denying the motion for self-representation.[2]

Even if the trial court did err in denying appellant's request, any error was harmless. Because the right to counsel in SVP proceedings is statutory, we will reverse only if it is more probable than not that appellant would have received a better result had he been allowed to represent himself. (*Williams, supra*, 110 Cal.App.4th at pp. 1592-1593.) Throughout the proceedings, appellant made repeated references to his inability to prepare his defense and his ignorance of the law. Subsequent appointed counsel ably cross-examined the prosecution's witnesses and presented expert testimony to try to counter the opinions of those witnesses who believed that appellant was an SVP. It is not reasonably probable that appellant would have received a better result had he been allowed to represent himself.

JURY INSTRUCTIONS

Appellant contends, "The trial court failed to instruct on the element of volitional impairment." He argues, "The trial court's failure to explicitly instruct on a required

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[2] The trial court told appellant at the time his motion for self-representation was denied that the court was doing so "based upon statements that you have made that the Court needs to place on the record, specifically that you are a lay person and are untrained in the practice of law, as well as some other aspects of this particular case concerning representation, preparation of a defense, hiring of experts, talking to potential witnesses, the Court does not feel that it would be appropriate to have you represent yourself." "The trial court may not determine a defendant's competency to waive counsel by evaluating his ability to present a defense." (*Koontz, supra,* 27 Cal.4th at p. 1070.) The court's remarks were made immediately after hearing appellant's request for substitution of appointed counsel and being told by appellant that he had failed to fill out the *Faretta* waiver form. Seen in this context, they are as much a description of the factors leading the court to conclude that appellant's request was not unequivocal as they are an assessment of appellant's legal ability.

finding that appellant had substantial difficulty controlling his prohibited sexual behavior deprived him of his due process right to a fair trial and of his due process/Sixth Amendment right to a jury determination on all essential factual issues."

The trial court instructed the jury that a sexually violent predator "has a diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely that he will engage in a sexually violent behavior upon his release." The jury was also instructed that "diagnosed mental disorder" "means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."

In *People v. Williams* (2003) 31 Cal. 4th 757 (*Williams*), the California Supreme Court said that "a commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one's criminal sexual violence, as required by *Kansas v. Crane* [(2002)] 534 U.S. 407 . . . . Accordingly, separate instructions or findings on that issue are not constitutionally required, and no error arose from the court's failure to give such instructions in defendant's trial." (*Id*. at p. 777, fns. omitted.) Appellant argues that *Williams* is distinguishable in that in *Williams*, "unlike the present case, there was no contradictory evidence on the issue of volitional control" and that *Williams* was "incorrectly reasoned." The *Williams* court's holding that separate instructions are not required was not based on the evidence presented, but on the arguments of law. We are bound by *Williams*. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

THE SPECIAL VERDICT

Appellant contends "[T]he verdict rendered by the jury was legally insufficient to support the trial court's order of commitment." The verdict asked the jury to make "Finding No. 1" by answering "yes" or "no" to the question of whether "The People of the State of California have proven beyond a reasonable doubt that the respondent, Raul

Raymond Olvera, has a diagnosed mental disorder." If the jury's answer to that question was "yes," the jury was to answer "yes" or "no" to "Finding No. 2: The People of the State of California have proven beyond a reasonable doubt that respondent's diagnosed mental disorder makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent criminal predatory behavior, if released." The jury was then to determine whether "We, the jury, further find that the respondent, Raul Raymond Olvera, IS/IS NOT a sexually violent predator within the meaning of Welfare and Institutions Code Section 6600." Appellant made no objection to the form of the verdict either when the court proposed to submit it or when the jury returned its finding.

Appellant argues, "The jury's verdict, indisputably found that appellant had a diagnosed mental condition that 'makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent criminal predatory behavior, if released;' however, it rendered no finding on the lack of control element. [Fn. omitted.] Absent a finding to that effect, the sole conclusion is that the State failed to prove all requisite elements in support of the petition, and the court's commitment order was, as a matter of law, without legal basis and in violation of appellant's due process rights."

Assuming for the sake of argument that appellant has not waived this issue by failing to object in the trial court (see *People v. Jones* (2003) 29 Cal.4th 1229, 1259) the verdict was sufficient. The jury was instructed that the last finding it made would only be relevant if the jury made the first two findings. The jury was adequately instructed on the SVPA, and the jury verdict tracked the language of the SVPA. Furthermore, because the jury necessarily found that appellant had difficulty controlling his sexually violent predatory behavior to find that appellant met the requirements of a sexually violent predator, any error was harmless.

DISPOSITION

The order appealed from is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.